STATE OF MICHIGAN

COURT OF APPEALS

PATRICK MORANT, Plaintiff-Appellant,	UNPUBLISHED August 17, 2006
v	No. 268503 Wayne Circuit Court
G & S TRANSPORTATION, INC., Defendant-Appellee.	LC No. 04-421256-NI

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(7), based on the statute of limitations. We reverse.

Plaintiff and defendant were involved in an automobile accident on December 17, 1998. In 2000, plaintiff sued defendant in LC No. 00-020021-NI and a default judgment was entered against defendant on June 11, 2001. That judgment was subsequently set aside and the case was dismissed without prejudice on May 20, 2004. Plaintiff thereafter brought this action against defendant on July 13, 2004. Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's action was barred by the three-year statute of limitations. Relying on MCL 600.5856, plaintiff argued that the statute of limitations was tolled while the previous action was pending. The trial court determined that MCL 600.5856 was not applicable and granted defendant's motion.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition may be granted under MCR 2.116(C)(7) if an action is barred by the statute of limitations. The standard for reviewing motions brought under MCR 2.116(C)(7) is as follows:

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most

> favorable to the plaintiff. [*Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

The parties agree that plaintiff's action is subject to a three-year statute of limitations. Plaintiff argues that, under MCL 600.5856, the statute of limitations was tolled between: (1) the date the first action was filed (June 21, 2000) or the date the original complaint was served on defendant (August 22, 2000); and (2) the date the original action was dismissed (May 20, 2004). At the time plaintiff filed his original action, MCL 600.5856 provided:[1]

> The statutes of limitations or repose are tolled:
>
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.
>
> (d) If, during the applicable notice period under section 2912b [MCL 600.2912b], a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

"[T]he statute of limitations is tolled during the time a prior suit is pending between the parties if the prior action is not adjudicated on the merits." *Roberts v City of Troy*, 170 Mich App 567, 581; 429 NW2d 206 (1988). Conversely, if a judgment is issued based upon the merits of the case, res judicata can apply and prevent the plaintiff from relitigating his claim. See *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 376; 652 NW2d 474 (2002).

In rejecting plaintiff's argument that MCL 600.5856 operated to toll the statute of limitations while plaintiff's first action was pending, the trial court reasoned:

> [T]he tolling provision would have applied from June 21, 2000 until May 20, 2004 if the earlier case was not adjudicated on its merits. However, a default

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[1] MCL 600.5856 was amended by 2004 PA 87, effective April 22, 2004. That amendment does not apply to this case.

> judgement [sic] is an adjudication [on] the merits and, therefore, the tolling provision was inapplicable.

Although a default judgment was originally entered, that judgment was subsequently set aside and the case was then dismissed without prejudice. "A dismissal without prejudice is not considered to be an adjudication on the merits, and therefore the tolling statute applies." *Fed Kemper Ins Co v Isaacson*, 145 Mich App 179, 183; 377 NW2d 379 (1985). See also *Yeo v State Farm Fire & Cas Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000), and *Stewart v Michigan Bell Telephone Co*, 39 Mich App 360, 367-368; 197 NW2d 465 (1972). The trial court erred in relying on a vacated default judgment to conclude that the tolling statute did not apply because the first action was adjudicated on the merits. It was not.

We note that if the prior proceeding had been finally resolved by a default judgment, and we therefore had to consider whether a default judgment is definitively an adjudication on the merits, we would rely on our Supreme Court's reasoning that entry of default does not adjudicate the merits of a claim, although it may operate to preclude adjudication of particular issues:

> Our decision is informed by our court system's preference for disposition of issues on their merits. For this reason, defaults and default judgments are not favored in the law. In this regard, it is important to emphasize that the entry of a default against Crenshaw does not establish that he was actually negligent in connection with the accident underlying this case. Rather, the entry of the default bars him from contesting the issue of his negligence because of his failure to properly participate in the litigation. Unlike Crenshaw, J. B. Hunt has participated in the litigation. [*Rogers v J.B. Hunt Transp*, 466 Mich 645, 654; 649 NW2d 23 (2002) (citations omitted)].

The Court there implies that deciding an issue on the merits and entry of default are simply not the same thing; default is the result of failure to engage in the legal process, rather than failure to prevail in the argument of a particular issue.

Because the three-year statute of limitations was tolled from at least August 22, 2000, to May 20, 2004, plaintiff timely refiled his action on July 13, 2004. Therefore, we reverse the trial court's decision granting defendant's motion for summary disposition based on the statute of limitations.[2]

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[2] We decline to consider defendant's suggestion that the trial court improperly set aside the default judgment in LC No. 00-020021-NI. We are without jurisdiction to consider the trial court's decision in that case and defendant may not collaterally attack that decision in the present appeal. *Stewart, supra* at 369.

Reversed and remanded. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Jessica R. Cooper
/s/ Stephen L. Borrello